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## THE OFFER OF AN ACT FOR A PROMISE

The term "unilateral contract" is frequently used in an undesirable sense to mean that there is no contract at all, either because there has been no acceptance of the offer or because there is no consideration for the promise to be enforced.<sup>1</sup> It should be used only where the agreement of the two parties has created a single duty and not mutual duties, with a single correlative right in the opposite party and not mutual rights. The term has been subjected to some criticism,<sup>2</sup> a criticism that is mainly due to a failure to distinguish between physical facts and the jural relations of persons caused by such facts. There cannot be "unilateral twins" sagely remarks Mr. Ewart, not observ-

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<sup>1</sup> *Morrow v. Southern Ex. Co.* (1897) 101 Ga. 810, 28 S. E. 998; *Ziehm v. Frank Steil B. Co.* (1917) 131 Md. 582, 102 Atl. 1005; *Meade v. Poppenberg* (1915) 167 App. Div. 411, 153 N. Y. Supp. 182. See Corbin, *Offer and Acceptance and Some of the Resulting Legal Relations* (1917) 26 YALE LAW JOURNAL, 173; 1 Williston, *Contracts* (1920) sec. 13.

<sup>2</sup> See the review of Anson on *Contract* (Am. ed. by Corbin, 1919) in 33 HARV. L. REV. 626.

ing that where twins exist as a fact it is quite possible for twin A to be under a duty to twin B in the absence of any duty whatever on the part of twin B to twin A.

The single duty existing in the case of a unilateral contract may rest either upon the offeree or upon the offeror, the correlative right being of course in the opposite party. In other words, the offer may confer a power on the offeree to create, by his subsequent voluntary act, either a duty on himself or a duty on the offeror. The latter is far the more frequent.<sup>3</sup>

Of the former Professor Williston says:<sup>4</sup> "Even when the offeror in terms offers an act of his own in exchange for a promise to be made by the offeree, the words of the offer are necessarily promissory, for the offeror must in the nature of the case, announce that he will do a certain act in the future, in return for a promise to be made to him. Indeed an offer which requests from the offeree a promise will, when accepted, always ripen into a bilateral rather than a unilateral contract, except in one narrow class of cases; namely, where the very giving of the promise by the offeree also has the effect of completing the act promised by the offeror. The only instance of this sort that can be supposed arises where the offeror offers (that is, promises) to transfer title to personal property on receiving a specified promise from the offeree."

This language is open to objection. It is inaccurate to say that "the offeror must, in the nature of the case, announce that he will do a certain act in the future";<sup>5</sup> for, as the author himself says in the next sentence, in some cases "the very giving of the promise by the offeree also has the effect of completing the act promised by the offeror." This makes it perfectly clear that the only *act* left to be done is the act of the offeree. In such case there is in fact no promise of any sort by the offeror, no "undertaking to do something in the future."<sup>6</sup> An offer of title to personal property in return for a promise by the offeree is not a "promise to transfer." It creates not a duty in the offeror but a power in the offeree. The only operative act still to take place is an act of the offeree, the making of the requested promise.<sup>7</sup> After making his offer, the offeror may go peacefully to sleep, confident that title to his chattel will pass to the offeree upon the latter's acceptance.<sup>8</sup>

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<sup>3</sup> See illustrations given in (1917) 26 YALE LAW JOURNAL, 173.

<sup>4</sup> 1 Williston, *op. cit.*, sec. 25.

<sup>5</sup> It is not safe to trust to the "nature of the case." This often means, as here, that the writer has chosen his own major premise and then assumes that it is infallibly and exclusively the true one. The assumption may here be due to the author's having defined a contract as "a promise or set of promises." *Ibid.*, sec. 1.

<sup>6</sup> 1 Williston, *op. cit.*, sec. 24.

<sup>7</sup> See *Mactier v. Frith* (1830, N. Y.) 6 Wend. 103; Y. B. 17 Edw. 4, 2.

<sup>8</sup> It seems not improbable that the courts will in the future hold acceptance

That the illustration in the passage quoted above is not the "only instance of this sort" may be observed from a study of *Suter v. Farmers' Fertilizer Company* (1919, Ohio) 126 N. E. 304. The plaintiff was a broker who had negotiated with the Aetna Explosives Company on behalf of the defendant, the result of the negotiation being that the defendant contracted with the Aetna Company to supply it with six hundred tons of sulphuric acid per month for twelve months at twenty-seven dollars per ton, specifically promising the Aetna Company in that contract to pay Suter, the broker, a commission of one per cent, "said brokerage to be paid as payments of the price were received by the defendant." After a few small deliveries had been made, on which the commission was paid to the plaintiff, the Aetna Company got into financial difficulties; it agreed with the defendant to rescind the contract for acid and paid to the defendant the sum of \$45,000 as consideration. The court held that the defendant was bound to pay the plaintiff the agreed commission on the agreed purchase price of the entire amount of acid and not merely on the \$45,000 received.

In this case the defendant denied that it had ever employed the plaintiff as broker, although there was some evidence to the contrary. The court rightly found it unnecessary to determine this question, for the plaintiff had in fact offered his services to the defendant, for pay, the latter had already received the benefit of these services in that a willing buyer was now at hand, and he now expressly promised a third party to pay for them. The contract thus made was unilateral, the services of the plaintiff being fully performed prior to the making of the express promise by the defendant. No duty ever rested on the plaintiff, but a duty to pay now rests on the defendant.<sup>9</sup> This case therefore clearly suggests the possibility of an offer of executed service for a return promise. A broker may without request on the part of the principal find and bring him a willing

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to be operative, even though the offeror is *dead* and no longer capable of acting. See German Civil Code, sec. 153.

<sup>9</sup>It is not within the scope of this comment; but the court seems to be quite right in holding that the defendant's agreed duty was to pay one per cent on the full contract price, and that the express condition precedent of payment by the Aetna Company was nullified by the fact that the defendant, by voluntary rescission, itself prevented the fulfillment of the condition. The defendant does not allege that the Aetna Company was insolvent. One cannot escape a duty by voluntarily preventing the fulfillment of a condition precedent to such duty by a third party; and such prevention does not cease to be *voluntary* merely because it seems that sound business policy requires it. See *Camden v. Jarrett* (1907) 83 C. C. A. 492, 154 Fed. 788; *Brackett v. Knowlton* (1912) 109 Me. 43, 82 Atl. 436; *Loehr v. Dickson* (1910) 141 Wis. 332, 124 N. W. 293; *Rumsey v. Livers* (1910) 112 Md. 546, 77 Atl. 295; *Weinberg v. Shulman* (1913) 53 Pa. Sup. Ct. 64; *Dupont Powder Co. v. Schlottman* (1914, C. C. A. 2d) 218 Fed. 353; *Colvin v. Post Mtge. & Land Co.* (1919) 225 N. Y. 510, 122 N. E. 454.

and able purchaser, informing the principal that he will expect a commission if a sale is made. The broker's work is then all done and he makes no promise. No doubt the principal can then make a sale to the purchaser introduced by the broker without binding himself to pay a commission. This is because the services have been thrust upon him; he is privileged not to accept the offer and he is not disabled from making a sale without accepting the offer.<sup>10</sup> But the point is that he has the power to accept the offer and to bind himself, this power to be exercised by making the sale and by expressing assent to the broker's proposal. In the case cited this is exactly what the defendant did.<sup>11</sup>

The case is not substantially different where the broker has rendered his service at the request of one who assumed without authority to act as the agent of the principal, although in holding the principal bound by his acceptance of the services the courts will now use the language of agency; they will speak of his being bound by "ratification." But this ratification is identical with the acceptance of an offer; and on such ratification, the resulting contract is unilateral exactly as above. The broker has made no promise and his services are all done before the principal makes any promise. This may be a case of past consideration; but if so we must make the best of it.

With respect to consideration these cases must be distinguished from the offer of a conveyance of property in return for a promise, referred to above. In neither case does the offeror make a promise or offer to undertake a duty. In both cases the offeror confers a power upon the offeree. But in the property case the exercise of the power by the offeree, the acceptance, will be detrimental to the offeror and beneficial to the offeree, since it is the final operative act effecting the conveyance of the property. This detriment and benefit are contemporaneous with the making of the offeree's promise, and so it may be argued that the consideration is not past, even though the acts of the offeror are all long since past. In the present case the exercise of the power by the offeree is not detrimental to the offeror (the promisee) or beneficial to the offeree (the promisor). By the act of acceptance nothing is taken from the promisee or given to the

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<sup>10</sup> *Walton v. Clark* (1893) 54 Minn. 341, 56 N. W. 40; *McVickar v. Roche* (1902) 74 App. Div. 397, 77 N. Y. Supp. 501; *Ballentine v. Mercer* (1908) 130 Mo. App. 605, 109 S. W. 1037.

<sup>11</sup> That the same decision *might have been reached* on some different ground is obvious, but the decision should be supported as it stands. See in accord: *Edson v. Poppe* (1910) 24 S. D. 466, 124 N. W. 441; *Muir v. Kane* (1909) 55 Wash. 131, 104 Pac. 153; *Spencer v. Potter* (1911) 85 Vt. 1, 80 Atl. 821; *Boothe v. Fitzpatrick* (1864) 36 Vt. 681; *Ferguson v. Harris* (1893) 39 S. C. 323, 17 S. E. 782; *Anderson v. Best* (1896) 176 Pa. 498, 35 Atl. 194. *Contra*: *Sharp v. Hoopes* (1906) 74 N. J. L. 191, 64 Atl. 989; *Bagnole v. Madden* (1908) 76 N. J. L. 255, 69 Atl. 967; *Wulff v. Lindsay* (1903) 8 Ariz. 168, 71 Pac. 963. See also notes in 53 L. R. A. 373, 26 L. R. A. (N. S.) 526.

promisor. The only new legal relations created by acceptance are a duty in the promisor and its correlative right in the promisee. These are in every respect beneficial to the latter. The only possible consideration for the promise, therefore, is the past action of the offeror (promisee). This action was indeed detrimental to him and beneficial to the offeree (promisor), but it lies in the past and at the time it occurred it created no right or duty either contractual or quasi-contractual.

The fact that the promisee has conferred an actual financial benefit on the promisor may well be regarded as a sufficient cause or reason for the enforcement of the express promise. The sale itself is not being forced upon the promisor, and the existence of the definite financial benefit takes the case out of the limbo of mere uncertain ethical opinion. No doubt decisions of this kind rest upon some moral obligation theory. So do all other past consideration cases. They do not rest upon any theory of quasi-contract, for the reason that the express promise of the defendant is held to be a necessary operative fact determining the amount of the recovery. The judgment is for the amount promised, not the amount of the value received and unjustly retained by the defendant.<sup>12</sup>

The doctrine that a moral obligation is a sufficient consideration is supposed to have been "exploded," but within limits it is far from dead. The doctrine of consideration itself rests upon moral obligation in a broad sense. It rests upon the *mores* of society—those approved rules, customs, and ideas that are generally believed to make for general welfare. In individual disputes the doctrine becomes a test of what the *mores* are and of the existence of social and moral obligation. But it must always be remembered that the *mores* determine the doctrine and that the doctrine does not control the *mores*. In no living and changing society can any legal rule or doctrine remain unchanged. It is only by giving the doctrine of consideration a continually new content that the doctrine itself can continue to live. It seems clear that in this way the doctrine of consideration is approaching the doctrine of *causa* in the Roman law.<sup>13</sup> Societal conditions in Roman and Continental life are not so different from those of England, America, and the English colonies as to prevent a similar development in law. It is the function of our courts to keep the doctrines up to date with the *mores* by continual restatement and by giving them a continually new content.<sup>14</sup> This is judicial legislation,

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<sup>12</sup> In *Wright v. Farmer's Bank* (1903) 31 Tex. Civ. App. 406, 72 S. W. 103, the plaintiff voluntarily paid the defendant's debt, and a later promise to pay was enforced. Here the amount is identical with the enrichment.

<sup>13</sup> See Lorenzen, *Causa and Consideration* (1919) 28 YALE LAW JOURNAL, 621.

<sup>14</sup> This shows the futility of codification as an attempt at final crystallization of the *mores*, though not as a means of careful and conservative legislation to do away with some doubts and conflicts.

and the judge legislates at his peril. Nevertheless, it is the necessity and duty of such legislation that gives to judicial office its highest honor; and no brave and honest judge shirks the duty or fears the peril.

A. L. C.

#### THE CORPORATE ENTITY AND INTERNATIONAL LAW

Two recent decisions of the British Privy Council, *The Kronprinzessin Cecilie (Part Cargo ex)* (1919, P. C.) 119 L. T. R. 457 and *The Hamborn* (1919, P. C.) 119 L. T. R. 463 illustrate the vicissitudes of the corporate entity theory in time of war. In the first case an American corporation, The Vacuum Oil Company, shipped a cargo of oil, f. o. b. on a German ship, to two of its subsidiary companies organized in Germany and Austria, practically all of whose stock was owned by the parent company in the United States. Notwithstanding this fact and an agreement by which the parent company undertook to bear any loss by reason of the failure of the goods to reach the subsidiary, the British prize court condemned the goods as "enemy owned." In the second case, a Dutch vessel flying the Dutch flag had been captured by a British cruiser on a voyage from New York to Cuba. It appeared that the vessel was owned by a Dutch company. The stock of this company was owned by two other Dutch companies, A and B. The stock in company A was in turn owned partly by B and partly by certain German companies, whose stockholders were Germans. The stock in company B was owned by German companies with German stockholders. The steamship was managed by two Germans resident in Holland, but the court found that the "control" of all the companies was exercised from Germany, and hence that the Dutch corporation owning the vessel was really "enemy." Thus, to achieve this result, three layers of corporate veil were stripped from the vessel to disclose the human beings whose economic interests as beneficial owners it was designed to reach.

In the Vacuum Oil case the real persons whose economic interests were affected were American citizens, but the condemnation was made in disregard of that fact because the consignee, though a subsidiary of an American corporation, had been organized in an enemy country.<sup>1</sup> In the *Hamborn* case, the vessel was owned by a neutral corporation, but the persons whose economic interests would be affected by the confiscation were Germans, encased in three coats of corporate formation. The conclusion would seem to follow that the prize court is no slave to any theory, corporate or other, but will confiscate property whenever belligerent interests seem to make it desirable and the

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<sup>1</sup> On a previous occasion, the State Department had extended its protection to the Vacuum Oil Co. of Austria against the Austrian government, because its stockholders were principally American citizens.